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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KLAMATH RIVERKEEPER, a nonprofit public benefit corporation; **HOWARD McCONNELL**; **LEAF G. HILLMAN**; **ROBERT ATTEBERY**; and **BLYTHE REIS**;

Plaintiffs,

v.

PACIFICORP, INC., an Oregon Corporation;

Defendant.

CASE NO.: C 07-06199 WHA

DEFENDANT PACIFICORP'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS DUPLICATIVE SUIT

Date: February 14, 2008
Time: 8:00 a.m.
Place: Courtroom 9, 19th Floor

Judge: Hon. William H. Alsup

PacifiCorp's Motion to Dismiss presents two questions: First, under the rule against claim-splitting, is this suit ("*Riverkeeper*") duplicative of Plaintiffs' other suit, *McConnell v. PacifiCorp*, No. 07-2382 ("*McConnell*")? And if so, how should the Court respond to this needless multiplicity of actions?

On the first question, Plaintiffs all but concede the suits are duplicative. They admit (as they must) that *McConnell* and *Riverkeeper* concern the same transactional nucleus of facts—the "most important" factor in deciding whether suits are duplicative for claim-splitting purposes. *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 689 (9th Cir.) (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)), *cert. denied*, 169 L. Ed. 2d 607 (2007). Their feeble arguments on the other relevant (but less important) factors also fail; *Riverkeeper* is obviously duplicative.

On the second question, Plaintiffs' opposition incredibly fails to mention the elephant in the room: this Court's August 16, 2007, Case Management Order in *McConnell* ("*McConnell* CMO"). The *McConnell* CMO gave Plaintiffs until September 27, 2007, to amend the *McConnell* complaint to add the very claim now asserted in *Riverkeeper*. Plaintiffs did not meet that deadline to amend, they waited months to file *Riverkeeper* as a separate suit, and they have never explained their manifest lack of diligence (or why they had to file *Riverkeeper* as a separate lawsuit). That lack of diligence clearly counsels against consolidating *Riverkeeper* with *McConnell*, and it aligns the situation here perfectly with the situation in *Adams*, where the district court dismissed the second suit with prejudice. The Court should do the same here.

I. THE *RIVERKEEPER* SUIT IS DUPLICATIVE

Plaintiffs agree that *Adams* supplies the test for whether a suit is duplicative: The Court "examine[s] whether the causes of action and relief sought, as well as the parties or privies to the action are the same." 487 F.3d at 689 (citing *The Haytian Republic*, 154 U.S. 118, 124 (1894)). Whether two causes of action are the same in turn depends on "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise

out of the same transactional nucleus of facts. The last of these criteria is the most important." *Id.* (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)).

Plaintiffs do not dispute that the same parties are involved. But they contend that "the causes of action in the two cases are not identical," Pl. Opp. at 6, and that "the remedy sought by Plaintiffs in [*Riverkeeper*] is entirely different from that available in [*McConnell*]," Pl. Opp. at 4. They are flat wrong on both counts.

A. *McConnell* And *Riverkeeper* Arise Out Of The Same Transactional Nucleus Of Facts

Plaintiffs concede that *McConnell* and *Riverkeeper* arise out of the same transactional nucleus of facts. Pl. Opp. at 4 ("[T]he transactional facts in the Nuisance Action and the RCRA action are substantially similar."). Nowhere in their brief do Plaintiffs argue otherwise, and their Related Case Motion admits the point even more emphatically: "[*McConnell* and *Riverkeeper*] . . . concern the same transaction or events." RJN, Ex. 2 (*McConnell* Related Case Motion) at 1.

This factor is the "'most important,'" *Adams*, 487 F.3d at 689 (quoting *Costantini*, 681 F.2d at 1202), and usually outcome-determinative, *see Int'l Union v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (citing res judicata cases where the court did not need to look beyond the "transactional nucleus" factor). Indeed, this factor is so overwhelming that Plaintiffs cite not one case in which the two actions shared a transactional nucleus of facts, yet were somehow not "the same" for res judicata or claim-splitting purposes.

Plaintiffs attempt to compensate for this total lack of support in the caselaw by hypothesizing that satisfying the "transactional nucleus of facts" factor is sufficient on its own only "where it appears that prejudice will be suffered by the defendant if the second action is allowed to proceed." Pl. Opp. at 3 (citing cases where the "transactional nucleus of facts" factor was determinative). The problem with Plaintiffs' self-invented and self-serving legal theory is that nowhere in any of those cases does the Ninth Circuit mention prejudice to the defendant, or even say in dicta that prejudice would be relevant to the "same cause of action" determination. Nor is there a logical reason to think that whether two cases are "the same" has anything to do

with whether that determination might prejudice a party. Worse yet, Plaintiffs stack the deck in choosing cases to analyze: Every case in the string citation on page 3 of their opposition is a res judicata case—in such cases, by definition, the first suit has ended in a judgment for the defendant, and permitting the second case to proceed would prejudice the closure the defendant enjoyed from that prior judgment. At bottom, Plaintiffs have simply invented a convenient rationalization of a selective set of caselaw—all in the service of an illogical rule.

The law is that the "transactional nucleus of facts" factor is ordinarily controlling. This factor is quintessentially satisfied here, so *Riverkeeper* is duplicative of *McConnell*. The Court need not proceed further, though an examination of the less important factors further supports a finding that *Riverkeeper* is duplicative of *McConnell*.

B. The Same Rights And Interests That Will Be Established In *McConnell* Would Be Adjudicated In *Riverkeeper*

The essential error in Plaintiffs' analysis of this factor lies in their choice to frame the issue in terms of legal theories, instead of general rights and interests. Plaintiffs point out that "a ruling that PacifiCorp has created a nuisance will not establish imminent and substantial endangerment for purposes of RCRA." Pl. Opp. at 8. That is doubtless true—by definition, two different legal theories will have different elements—but it is beside the point: As the Ninth Circuit's analysis of this factor in *Adams* illustrates, the question is not whether the elements of a new legal theory are slightly different from the elements of an old legal theory. In *Adams* (which arose out of a disputed employment background investigation), the question was not whether proof of a breach of the covenant of good faith and fair dealing (in the first suit) was also a violation of the Fair Credit Reporting Act (in the second suit). Rather, what mattered to the Ninth Circuit was that "the legality . . . of Adams' background investigation" was raised in both cases. 487 F.3d at 690; *accord Costantini*, 681 F.3d at 1202 (both suits raised "TWA's freedom from liability for the loss of appellant's license agreement").

Likewise here, the salient "rights and interests" are not defined by legal tests. Rather, just as PacifiCorp stated in its Motion to Dismiss at page 8, the rights and interests at stake are PacifiCorp's responsibility, or lack thereof, for allegedly causing blooms of *Microcystis*

aeruginosa ("MSAE") to grow and spread in the Klamath River. That responsibility is at stake in both *McConnell* and *Riverkeeper*, which confirms that *Riverkeeper* is duplicative.

C. Substantially The Same Evidence Will Be Presented In *McConnell* And In *Riverkeeper*

Plaintiffs first concede that "there will be overlapping evidence" in *McConnell* and *Riverkeeper*—and go on to list nearly every relevant topic in the cases ("concentration, volume, and discharge locations of the *microcystin* algae and the associated toxin, as well as impacts to human health and the environment"). Pl. Opp. at 7. But in the next breath, Plaintiffs maintain that the evidence required to adjudicate *McConnell* will be "significantly different" from the evidence required to adjudicate *Riverkeeper*. Pl. Opp. at 7. They point to issues in *Riverkeeper* such as "whether the *microcystin* algae and toxic waste are solid waste as defined by RCRA" and "whether PacifiCorp is contributing to the handling, storage, treatment, transportation, or disposal of that solid waste." Pl. Opp. at 7.

Plaintiffs' argument mixes up evidence (documents and testimony) and legal conclusions (which are proven or disproven by evidence): Of course the legal issues will be different for different legal theories. But in all likelihood, the relevant fact and opinion evidence will be very much the same. For example, scientific studies and testimony about the causes of MSAE proliferation may shed light on whether PacifiCorp's day-to-day operations are the proximate cause of that proliferation (a salient question for the state law theories in *McConnell*), and that same evidence may shed light on whether PacifiCorp is contributing to the handling, storage, treatment, transportation, or disposal of the MSAE (a salient question under RCRA in *Riverkeeper*, assuming that MSAE is even "solid waste" to begin with).[1]

Even if there would not be perfect overlap in the evidentiary presentations in

[1] Plaintiffs also digress into the evidence required to establish subject matter jurisdiction in the two cases. But Plaintiffs get the law wrong: The $75,000 amount-in-controversy threshold of 28 U.S.C. § 1332 is tested against the allegations of the complaint, not evidence. *See, e.g., St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). And Article III standing must be satisfied for both the state law claims of *McConnell* and the federal law claim of *Riverkeeper*. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (Article III standing is required and determined by federal law for all cases in federal court).

McConnell and *Riverkeeper*, it seems quite safe to say that the Court would be presented with "*substantially* the same evidence" about MSAE and microcystin. Indeed, this is almost verbatim what Plaintiffs wrote in their Related Case Motion: "The Judge [in *McConnell* and *Riverkeeper*] will be presented with substantially similar information on these pollutants." RJN, Ex. 2 (*McConnell* Related Case Motion) at 3. Accordingly, this factor also weighs in favor of finding that *McConnell* and *Riverkeeper* assert the same cause of action for claim-splitting purposes.

D. *McConnell* And *Riverkeeper* Involve Alleged Infringement Of The Same Rights

Without citation or argument, Plaintiffs assert that "[c]learly [*McConnell*], involving the creation of a nuisance under state law, and [*Riverkeeper*], alleging violations of the Federal Statute regulating the handling, treatment, storage, and disposal of solid and hazardous waste, do not involve infringement of the same right." PacifiCorp explained in its Motion to Dismiss at pages 8-9 that these cases invoke the same right because both involve allegations that Plaintiffs' (and the public's) right to a clean, healthy Klamath River environment has been infringed by PacifiCorp's operation of the Project. Plaintiffs do nothing to refute that.

Moreover, the broader position Plaintiffs seem to take—that state nuisance law and federal environmental laws vindicate different rights—flatly contradicts the history and structure of federal environmental law: "'To a surprising degree, the legal history of the environment has been written by nuisance law. . . . Nuisance theory and case law is the common law backbone of modern environmental and energy law.'" J. Sevinsky, Public Nuisance: A Common-Law Remedy Among the Statutes, *Natural Resources and Environment*, Summer 1990, at 29, 30 (quoting W. Rodgers, *Environmental Law: Air and Water* 1-2 (1986)). In fact, RCRA and other federal environmental laws have the closest possible relationship with common law nuisance: They have displaced the federal common law of nuisance. *See Nez Perce Tribe v. Idaho Power Co.*, 847 F. Supp. 791, 815 n.28 (citing *Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (Clean Water Act displaces federal common law of nuisance); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (Clean Air Act displaces federal common law of nuisance); *United States v. Price*, 523 F. Supp. 1055, 1069 (D.N.J. 1981) (RCRA and CERCLA displace

federal common law of nuisance), *aff'd*, 688 F.2d 204 (3d Cir. 1982)). In effect, *McConnell* is a suit under state nuisance law, and *Riverkeeper* is a suit under the statutory successor to federal nuisance law. The rights allegedly infringed in these two suits could scarcely be more alike, so this factor weighs strongly in favor of finding that *McConnell* and *Riverkeeper* assert the same cause of action for claim-splitting purposes.

E. *McConnell* And *Riverkeeper* Seek Substantially The Same Relief

Plaintiffs argue that the unavailability of injunctive relief on the state law claims in *McConnell* means that their claim for injunctive relief in *Riverkeeper* is not duplicative. Pl. Opp. at 5-6. Two essential contradictions undermine this argument. First, these same Plaintiffs contended, at the time they filed *McConnell*, that injunctive relief *was* available in *McConnell*. In opposing PacifiCorp's motion for judgment on the pleadings, they again contended that injunctive relief was available in *McConnell*. And they apparently still believe injunctive relief should be available in *McConnell*—even in briefing this motion, Riverkeeper emphasizes that it "reserves its right to challenge [the injunction] element of the Court's [*McConnell*] ruling on appeal." Pl. Opp. at 1 n.1. These same Plaintiffs cannot simultaneously pretend in their defense of this motion that injunctive relief never was available or sought in *McConnell*. Second, when a plaintiff faces a motion to dismiss based on res judicata or the rule against claim-splitting, that plaintiff invariably got there by filing a second lawsuit after being disappointed by the results of the first lawsuit. In other words, that plaintiff was disappointed by the unavailability in the first suit of the relief he desired. That disappointment is exactly what Plaintiffs say their motivation was here. *See* Pl. Opp. at 5-6. At bottom, there is little to distinguish *Riverkeeper* from the run-of-the-mill duplicative suit filed by a plaintiff disappointed with the progress of an earlier suit.

Two other points bear brief mention: First, Plaintiffs do not quarrel with PacifiCorp that, where claim-splitting is concerned, RCRA civil monetary penalties (sought in *Riverkeeper*) are essentially the same relief as punitive damages (sought in *McConnell*). Second, even though Plaintiffs emphasize a supposed mismatch of remedies between *McConnell* and *Riverkeeper*, they cite no case in which such a difference was outcome determinative, or even seriously considered in the court's analysis. Hence, even if the Court sees an imperfect

correspondence between the remedies available in *McConnell* and in *Riverkeeper*, it should still find *Riverkeeper* duplicative on the basis of the factors above.

II. THE COURT SHOULD DISMISS *RIVERKEEPER*

Adams holds that, following a finding that a suit is duplicative, this Court has (at least) four options: dismiss *Riverkeeper* with prejudice; dismiss *Riverkeeper* without prejudice (and remit Plaintiffs to a motion to modify the *McConnell* CMO and amend the *McConnell* complaint under the exacting "good cause" standard of Fed. R. Civ. P. 16); simply consolidate *Riverkeeper* with *McConnell*; or stay *Riverkeeper*. 487 F.3d at 688, 692. This Court has "an ample degree of discretion, appropriate for disciplined and experienced judges" in making this choice, and as *Adams* itself demonstrates, the Court of Appeals is unlikely to disturb that choice. *Id.* at 692 (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952)).

Plaintiffs suggest that the Court consolidate *Riverkeeper* with *McConnell*, arguing that PacifiCorp fails to demonstrate prejudice from allowing *Riverkeeper* to proceed. Pl. Opp. at 8. Plaintiffs argue that the alternative (dismissal) is appropriate only when the "defendant would suffer significant prejudice if the second action was allowed." Pl. Opp. at 8. Once again, Plaintiffs have made up a legal rule that does not appear in the caselaw—and worse yet, the only cases they cite are res judicata cases, where the court had no choice but to dismiss the second action. When it comes to cases about claim-splitting—like *Adams* and *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982 (10th Cir. 2002)—prejudice to the defendant has never been required, or even relevant. In fact, *Adams* devotes three pages to discussing the dismissal remedy, but never even mentions prejudice (or lack of prejudice) to the defendant of allowing the second action to proceed—let alone give it the exclusive focus and dispositive weight that Plaintiffs do. *See* 487 F.3d at 692-94.

What *Adams* does discuss at length is diligence, *see id.* at 693, and that is what Plaintiffs lack here. PacifiCorp's Motion to Dismiss at pages 4-5 detailed Plaintiffs' indolence in bringing their RCRA claim: how they filed a notice of suit on June 27, 2007; how they failed to amend the *McConnell* complaint by September 27, 2007, when that notice had ripened (despite their announced intention to do so); and how months later they elected to file a "new" complaint

that is entirely derivative of the *McConnell* complaint. Plaintiffs scarcely acknowledge this timeline, or the inescapable conclusion that this entire proceeding is the product of their reckless failure to amend the *McConnell* complaint within the time limits in the *McConnell* CMO.

The closest Plaintiffs come to addressing this central issue is a cryptic offer "during oral argument . . . to provide the background on the decision to file a new action rather than amending the Nuisance Action."[2] Pl. Opp. at 2 n.2. Plaintiffs also say their "decision to bring the separate RCRA Action was based in large measure on the availability of injunctive relief under RCRA." Pl. Opp. at 5. This is revisionist at best—and outright deceptive at worst. First, one hopes that the decision to bring the RCRA action was not actually "based in large measure on the availability" of certain relief, but rather based on a good faith belief in the merit of the claim asserted. Second, bringing a RCRA claim has nothing to do with filing a separate suit—until they missed the September 27 deadline in the *McConnell* CMO, Plaintiffs had vowed to add the RCRA claims by amendment to *McConnell*. *See* RJN, Ex. 3 (*McConnell* Joint CMC Statement) at 10. Third, Plaintiffs present the decision to file the RCRA action as if it were a new idea that occurred to them after the Court ruled in *McConnell* that injunctive relief on state law theories was preempted by the Federal Power Act. But Plaintiffs sent their notice of intent to sue under RCRA on June 27, 2007, and PacifiCorp did not even brief the Federal Power Act preemption issue until it sought judgment on the pleadings on July 12, 2007. *See* RJN, Ex. 6 (*McConnell* docket report).

All this shows why consolidation of *Riverkeeper* with *McConnell*—Plaintiffs' proposed remedy for the delay, disruption, and multiplicity they have caused—would be so inappropriate. Consolidation would put Plaintiffs in as good a position as if they had diligently amended the *McConnell* complaint. That result can hardly be equitable—the Ninth Circuit describes a court's decision on the remedy for a duplicative suit as "weighing the equities of the case," *Adams* at 688, and of course, a "lack of diligence precludes equity's operation," *Pace v.*

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[2] Obviously, PacifiCorp cannot respond in this brief to the unstated "background on the decision to file a new action."

DiGuglielmo, 544 U.S. 408, 419 (2005) (citations omitted).

Accordingly, dismissal of *Riverkeeper* is appropriate here. As discussed in PacifiCorp's Motion to Dismiss at pages 10-12, this case is indistinguishable from *Adams*, where the second suit was dismissed with prejudice. The only conceivable factual distinction to be drawn between these cases and the *Adams* cases is that Adams had tried to make a late amendment to the complaint in her first suit. But the Ninth Circuit does not even mention that motion in its lengthy discussion of why the district court was within its discretion to dismiss Adams' second suit—suggesting that Adams' motion to amend was irrelevant to whether her second suit should be dismissed with prejudice. *See Adams*, 487 F.3d at 692-94. If anything, Adams' motion to amend made her *more* diligent than Plaintiffs here—who simply waited silently for months to file anything, after they missed the September 27, 2007, deadline in the *McConnell* CMO.

The Court would also be within its discretion to dismiss *Riverkeeper* without prejudice, to allow Plaintiffs to move to modify the *McConnell* CMO and amend the *McConnell* complaint under the "good cause" standard of Fed. R. Civ. P. 16. That said, Plaintiffs still have not explained their apparent lack of diligence (despite an obvious opportunity to do so in their opposition brief), which raises serious questions about whether Plaintiffs can show "good cause." Hence, embarking on a dismissal without prejudice, followed by a dubious motion to modify the *McConnell* CMO and amend the *McConnell* complaint, holds a serious risk of further increasing *Riverkeeper*'s already considerable unnecessary expense to PacifiCorp. Accordingly, if the Court is inclined to dismiss *Riverkeeper*, but without prejudice, PacifiCorp respectfully suggests that the Court may wish first to consider ordering Plaintiffs to proffer their basis for believing they can meet the "good cause" standard in *McConnell*.

Dated: January 31, 2008

Respectfully submitted,

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